7-1727
No.

IN THE

t of the United States

BER TERM, 1987

RWICK MAIN & CO.,

Petitioner,

—v.—

HOMAS TEW,
ESM GROUP, INC., *et al.*,

Respondent.

A WRIT OF CERTIORARI
TATES COURT OF APPEALS
ELEVENTH CIRCUIT

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ter
d

QUESTIONS

1. Is the independent action t
lently obtained judgment under
60(b) of the *Federal Rules of*
stances of "extrinsic fraud" or

2. Is there no power under t
60(b) to set aside a judgment for
the trial attorney had suborned
which was instrumental in winn

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* Respondent is the Receiver
owned subsidiaries, ESM Grou
Inc., ESM Securities, Inc. and

a fraudu-
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d evidence

and its wholly-
ment Securities,
p, Inc.

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7 J. Moo
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Advisory
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IN THE

eme Court of the United States

OCTOBER TERM, 1987

No. ____

PEAT MARWICK MAIN & CO.,

Petitioner,

—v.—

THOMAS TEW,
RECEIVER FOR ESM GROUP, INC., *et al.*,

Respondent.

ITION FOR A WRIT OF CERTIORARI
E UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

rwick Main & Co. (formerly Peat, Marwick, Mitch-espectfully petitions for a writ of certiorari to review nt and opinion of the United States Court of Ap-he Eleventh Circuit in this case.

OPINIONS BELOW

ion of the court of appeals (App. A, *infra*, 1a-8a) is 835 F.2d 270. The opinion and order of the United rict Court for the Southern District of Florida (Gon-) (App. B, *infra*, 9a-18a) is not reported.

JU

The judgment of the c
7, 1988, and a petition
10, 1988 (App. C, *infra*,
invoked under 28 U.S.C

RU

Rule 60, *Federal Rules*
ment or Order

(b) **Mistakes; Inadver**
covered Evidence; Fraud
as are just, the court may
sentative from a final ju
following reasons: (1) mi
able neglect; (2) newly d
gence could not have bee
trial under Rule 59(b); (
nated intrinsic or extrin
conduct of an adverse p
judgment has been satisf
judgment upon which it
vacated, or it is no long
have prospective applica
relief from the operation
made within reasonable
not more than one year
ing was entered or taker
does not affect the final
tion. This rule does not
an independent action to
or proceeding, or to gran
sonally notified as provi
to set aside a judgment
coram nobis, coram vo

of review, are abolished, and the
elief from a judgment shall be by
ules or by an independent action.

OF THE CASE

accounting firm, was sued in a
r gross negligence. The plaintiff
government securities. ESM al-
nt loss, separate from its trading
Marwick's accountants' report,
he financial statements of Wuv's,
dict in 1983 of approximately $4.5
nitive damages, was affirmed by
Court of Appeal without opinion.
er appeal to the Supreme Court of
ce without opinion by an interme-
la Rule of Appellate Procedure
984 Peat Marwick paid the judg-
a total of nearly $5 million. App.

months after the jury verdict, the
mission filed an injunction action
nst ESM and its affiliated compa-
laced into receivership by order of
the respondent was appointed Re-
assive 10 year-long fraud gradually
l story. ESM was never profitable,
roughout its existence. It received
ports on its financial statements
tors, Alexander Grant & Co., only
t firm's audit engagement partner
sentenced to a substantial term in
eficiency when finally uncovered in
million. The three ESM principals

are all presently incarcerated having received lengthy sentences. App. 25a-26a.[1]

On December 23, 1985, Peat Marwick filed this independent action under Rule 60(b) by way of a proof of claim in the district court below, which sought recovery of the amount paid in satisfaction of the judgment along with the interest and costs. App. 21a-29a. It alleged that one feature of the fraud later uncovered by the SEC action had been the 1983 state court trial and pre-trial proceedings. Specifically, it alleged that two of ESM's principals, with their attorney's knowing involvement, perjured themselves at trial when they asserted they had relied on the Wuv's audited financial statements (which included a significant related-party transaction), and that ESM's attorney knowingly produced false financial statements in response to a discovery demand and knowingly withheld other responsive records. App. 26a-28a.

Treating the proof of claim as a complaint and respondent's objection to it as a motion under Fed. R. Civ. P. 12(b)(6), the district court dismissed. The court found the allegations did "not constitute extrinsic fraud or 'fraud upon the court,' which is the only species of fraud that would entitle it" to relief from the earlier judgment "more than one year after it was entered." App. 12a.

The court of appeals affirmed, concluding that ESM's fraud "had nothing to do with the negligent audit for which Peat Marwick was found liable" and that the trial attorney's knowledge and concealment of the fraud did not amount to "fraud on the court." App. 5a, 7a.

---

1 ESM's principals caused the ever-increasing losses of ESM Government Securities, Inc. to be reflected on the books of an affiliate, ESM Financial Group, Inc., while cash for operations of the former company was obtained from investors who were misled into believing that the company was sound. An intercompany account was created to reflect a payable from ESM Financial Group, Inc. to ESM Group, Inc. By accruals of interest on this "payable," the latter company was made to appear profitable until the very end. In fact, all of the companies had been insolvent since 1980, if not before. App. 25a.

REASONS FOR GRANTING THE WRIT

the past 14 months, the Third and Eleventh Circuits endered sharply conflicting answers to the first question ted, one that has bedeviled the courts since 1948. The Circuit permitted an independent action for relief from ier judgment on grounds of ordinary fraud practiced by rty upon the other. The Eleventh Circuit denied relief, ef- ly limiting authority for the independent action to an ex- inary degree of "fraud upon the court" beyond even that orned perjury.

I.

atest Circuit Conflict Over An Historically Divisive Issue Requires Resolution By The Court.

The decision below—that only "extrinsic fraud" or d on the court" will justify an independent action under 0(b)—flatly contradicts a contemporaneous decision of ird Circuit, *Averbach* v. *Rival Manufacturing Co.*, 809 016 (1987), holding that an independent action will lie for nsic fraud" between the parties (a false answer to an in- atory). While a current and palpable conflict between two s is traditionally a ground for the Court's review, what is e here is more than that. It is the latest manifestation of a t that has divided the federal and state courts for over ndred years, originating in *United States* v. *Throckmor-* 3 U.S. 61 (1878), which was apparently but not explicitly led by *Marshall* v. *Holmes*, 141 U.S. 589 (1891).

n the adoption of the Federal Rules of Civil Procedure, specially the 1946 amendment to Rule 60(b), it was nt that the "extrinsic"-"intrinsic" distinction had been ned, at least for the federal courts. But because of a tex- uirk, the distinction persists and has even divided the lead- holars on federal practice, with Professors Moore and

side and Professors Wright and Miller on the

n began in 1878, when the United States sought
ar-old decree which had been obtained by means
instrument and perjured testimony. The Court
on observed that equitable belief could only lie
trinsic or collateral," to the matter tried by the
U.S. at 68. In 1891, the Court in *Marshall* osten-
with *Throckmorton* by stating precisely to the
forged instrument and false testimony would
cause of *Marshall's* vague reference to *Throck-*
.S. at 596, the intrinsic-extrinsic distinction and
sparities of treatment continued. They continued
xample, the Seventh Circuit's unsuccessful at-
to certify the vexing question to the Court,
ot, 162 U.S. 435) until 1948 when amended Rule
ffective. And then they continued in the face of

o the Advisory Committee, the amendment to
nits, either by motion brought within one year of
or by independent action, relief from a prior
ounds of fraud. But, while that part of the Rule
elief by motion defines fraud broadly, "whether
ominated intrinsic or extrinsic," Rule 60(b)(3),
clause providing for an independent action after
of one year is otherwise silent. The Advisory
ed, however, that, in addition to its express au-
f by motion, fraud may also be urged as a basis
lependent action "insofar as established doctrine
R.D. 433, 479 (1946). The third and concluding
authorizes relief in cases of "fraud upon the

ey join in condemning the distinction; the former conclude
view engrafts it upon the Rule, the latter not. *Compare* 7
J. Lucas, *Moore's Federal Practice* ¶ 60.37 (2d ed. 1987)
Wright & A. Miller, *Federal Practice and Procedure* § 2868

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Id

fraud in its various manifestations has
Rule 60(b), the first two distinguished
ıe third describing a distinct ground for
bons makes this clear in his *Averbach*

of Rule 60(b) nor its legislative history
tion which would limit an independent
m a judgment to 'fraud on the court' as
fraud of some other sort." 809 F.2d at

rity of courts over the ensuing 40 years,
the one below, has reintroduced the
rement whenever more than one year
ıe of judgment. They have done so usu-
rinsic fraud" with "fraud upon the
final saving clause embracing the latter
describes an entirely discrete ground for
ased on the so-called "fraud on the

ule 60(b) does not distinguish between motions
ns for fraud except that the former must be
ourt within one year and the latter are limited
es of limitations, Judge Gibbons added:

ably ask what was the purpose of the drafters in
)(1), (2) and (3) motions to a one year time limit
stantive time bar. The answer, as is so often the
al Rules of Civil Procedure, lies in the former
eir adoption, there were terms of court, and cer-
ethods of obtaining relief from judgments were
ilable after the expiration of the term at which
ntered. *E.g.*, *United States* v. *Mayer*, 235 U.S.
en both the terms of court and the common law
d, the time limit with respect to some motion
rmer common law writs was substituted. See 11
ller, *Federal Practice and Procedure* § 2866, at
der the old practice, however, the expiration of
ıd no effect upon the timeliness of an indepen-
f from judgment. The rule carries forward this
ıe motion procedure is subject to a one year
ot apply to the independent action for fraud.'
Id.

in *Hazel-Atlas Glass Co.* v.
38 (1944), which held that a
r to set aside a judgment ob-
the presence of laches or lack

d to the attention of the court
Marshall v. *Holmes*.[4] Judge
presumably in light of Elev-
arlier Fifth Circuit decisions,
Manufacturing Co., 320 F.2d
he extrinsic-intrinsic dichot-
w relied on and quoted from
e, 761 F.2d 1549 (11th Cir.
d the independent action to
rt below purported to eschew
rinsic dilemma altogether, it
ning that has perpetuated the
those bringing independent
Peat Marwick's allegations of
in the fraud were effectively
e type of fraud which the liti-
not prevent a party from gain-
of justice." App. 6a.

d forward a long and tortured
ced a host of unjust results.
ed how manipulative courts
See, e.g., Note, *Federal Rule*
nts, 61 Yale L.J. 76, 77 n.4
courts has been the desire for
iginally in *Throckmorton*, of
earlier Third Circuit opinion,
n rebuttal: "We believe truth

nsic' distinction which is based on a
ockmorton . . . was overruled, if it
Holmes. . . ." *Averbach* v. *Rival*
2d at 1022.

is more important than the tr
v. *Shallcross*, 106 F.2d 949, 9
U.S. 624 (1940). As Justice

> "For these reasons we a
> ity to attempt a distinct
> matter.' . . . Plainly, th
> gation is the lesser evil
> 321, 330, 88 A.2d 20
> Moore).

Since 1948, the theoretical
quirement has been the text
text obliterates any differen
Court should grant certiora
cuit's explication of Rule 60
least to end this Sisyphean e
sion is enough.

B. "The perpetuation of
has led the federal courts i
cause the distinction is unnec
tially productive of injustice
finality." Comment, *Rule 6*
eral Reform, 60 Calif. L. Re
tion echoes what has been
commentators for nearly a c
the British courts, *e.g.*, *Cole*
the Canadian, *Johnston* v.
1905), along with the minori
ject the distinction. A simila
into amended Rule 60(b)(3)
now confined in the federal
the saving clause.

Because fraud is inherentl
ten occur, if at all, more tha
why the independent action
dent action to "extrinsic fra
eral courts since 1948 has

it." *Publicker*
ert. denied, 308

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ic and intrinsic
f vexatious liti-
ammas, 9 N.J.
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rinsic fraud re-
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the Third Cir-
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the interests of
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That condemna-
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ng rationale led
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724 (Ont. C.A.
al courts, to re-
cifically written
persists, albeit
nt actions under

iscovery will of-
dgment. That is
ing the indepen-
majority of fed-
the discredited

The district court simply classified all of this a
fraud" and dismissed. App. 12a-18a. The court of a
a more elliptical tack. First, it pointed to the truism
fraud had nothing to do with Peat Marwick's audit
issue in the state trial. Ignoring the Rule 60(b) alleg
ing to reliance and lack of auditor independence,
that ESM's fraud did not prevent Peat Marwick fro
ing a defense to the negligence claim, because the f
only have been introduced to attack the credibilit
witnesses.[5] Despite this obvious impact on the inte
fact-finding process and on the core issue of reliand
claim, the court of appeals concluded that fraud
parties, for example, the perjury of ESM's princ
nesses") and its outside auditor ("accountants"
raised within one year of judgment, and that the al
attorney involvement, "even if true . . . do no
fraud on the court." App. 5a-7a.

The foregoing reasoning is illustrative of that exp
long line of opinions requiring proof of "extrinsic
Note, *Attacking Fraudulently Obtained Judgments*
eral Courts, 48 Iowa L. Rev. 398, 408-09 (1963). It
only a craving for finality, but insistence upon a de
gence that is impossible to meet. For example, in *P*
91 Cal. 129, 134, 25 P. 970, 971 (1891), one of the l
cases, where the only (and thus crucial) witness to
tion in question had been paid for his perjury, th
that the losing party must somehow be prepared "
expose perjury then and there," that is, at the firs
trial is his opportunity for making the truth appear
guage is almost identical to what the court of appea
"This is the type of fraud which the litigants sho
. . . ." App. 6a.

---

5 The court also alluded to Peat Marwick's negligence
basis of the state court judgment. App. 5a, 7a. But th
subject matter of the trial with the post-judgment dilige
attempting to uncover the fraud. *Cf. Hazel-Atlas*
Hartford-Empire Co., *supra*, 322 U.S. at 246. Even
counting firm is entitled to an untainted trial.

Hartford-Empire Co., *supra*, it disserves important interests of the judiciary and the legal profession.

The most shocking aspect of the opinion below is its treatment of the attorney's role and its implicit view of the adversary system. Its attempt to distinguish *Hazel-Atlas* is illustrative. The attorney for Hartford in that case had written an article that was published under the name of an expert and then relied on in a patent application and later infringment suit. Justice Black, writing for the majority 12 years later, found that to be "fraud on the court" warranting relief. Although subornation of perjury is presumably worse, the court of appeals stated nonetheless that even if ESM's attorney "knew of ESM's securities fraud, [it] did not have the same impact [as the conduct of the Hartford attorney] on the judicial system." App. 7a. The attorney's knowledge in the present case, it must be remembered, encompassed what was probably the largest securites fraud in our history, and Peat Marwick's allegations in any event went beyond knowledge to participation by virtue of his conduct during discovery and trial.

As for Peat Marwick's other specific allegations, that the attorney knowingly produced false documents and knowingly proffered the perjured testimony of his clients, the court of appeals was equally cavalier:

> "They show that ESM's attorney may have known of potential defenses available to Peat Marwick, but this is not fraud on the court. *Kerwit Medical Prods., Inc.* v. *N & H Instruments, Inc.*, 616 F.2d 833, 387 (5th Cir. 1980). An attorney is expected to present his client's case in the light most favorable to the client and he has no duty to inform the opposing party of potential defenses. *Id.*" App. 6a-7a.[7]

---

7 Apparently the court believed that petitioner was only deprived of its ability to impeach ESM's principals. (Indeed, had the judge and jury been able to discern by means of such impeachment that a massive fraud was occurring before their very eyes, no doubt the trial would have abruptly ended.) But much more than that was involved. Two of ESM's three principals testified falsely that they relied on the Wuv's

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that standard in the conduct of a case he perpetrates ud upon the court." 7 *Moore's Federal Practice*, *su-* ¶ 60:33, at 60-359 (footnote omitted).[9]

ndamental flaw in the approach taken by the court of as its willingness to disregard the universally recog- fessional duty *not* to mislead the court in representing That duty is a better guide to what constitutes "fraud court" under Rule 60(b) than the indulgent charter y the court of appeals.

inions below are reminiscent of Justice Roberts's dis- *azel-Atlas*, where relitigation was described with ab- and *United States* v. *Throckmorton* with approval. at 261 n.18. Justice Black's opinion for the majority, st, emphasized "the integrity of the judicial process," at 246, in overriding the term rule whose modern art is the 12-month limitation on certain motions un- 60(b):

Equitable relief . . . is a judicially devised remedy ioned to relieve hardships which, from time to time, from a hard and fast adherence to another court- e rule, the general rule that judgments should not be urbed after the term of their entry has expired. Created

---

e new ABA Model Rules of Professional Conduct are equally in- t that trial counsel has duties to the judicial process that tran- l his client's interest in winning:

le 3.3 Candor Toward the Tribunal

A lawyer shall not knowingly:

• • •

(4) offer evidence that the lawyer knows to be false. . . ."

le 3.4 Fairness to Opposing Party and Counsel

awyer shall not:

a) unlawfully obstruct another party's access to evidence or un- wfully alter, destroy or conceal a document . . . having potential identiary value . . .

b) falsify evidence, counsel or assist a witness to testify falsely . . ."

to avert the evil
dure has always
ables it to meet
intervention, an
rect the particul
322 U.S. at 248

The most egregio
present case was th
fraud, which was la
mony he elicited on
view, the Court can
beyond the pale in a
side, 475 U.S. 157,

"This special d
frauds upon th
perjury is as mu
jurors by way o
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ONCLUSION

s, this petition for a writ of certiorari

Respectfully submitted,

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APPENDICES

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APPENDIX A

ATES COURT OF APPEALS,
LEVENTH CIRCUIT.

Jan. 7, 1988.

No. 86-5958.

& EXCHANGE COMMISSION,

Plaintiff,

vs.

I GROUP, INC., et al.,

Defendant-Appellee,

RWICK, MITCHELL AND CO.,

Claimant-Appellant.

United States District Court for the
ern District of Florida.

d ANDERSON, *Circuit Judges*,
NS*, *Senior District Judge*.

de Atkins, Senior U.S. District Judge for the
a, sitting by designation.

district court's dismissal of a
ck, Mitchell and Co. ("Peat
oup, Inc. ("ESM"). ESM has
on the request of the Securities
"SEC"). In its claim, Peat
strict court set aside a Florida
ainst it on the grounds that the
ined. The district court denied
dgment and dismissed its claim
of action under Fed.R.Civ.P.

ed Peat Marwick in a Florida
eat Marwick had been "grossly
of audited financial statements
'Wuv's"), a company in which
on. ESM asserted that it had in-
wick's "unqualified" audit re-
use Wuv's was not a "going
d have rendered a "qualified"
cial statements.
it was awarded approximately
mpensatory damages, punitive
t was entered on January 18,
rt of Appeal affirmed without
4. Therefore, no appeal to the
ssible. Peat Marwick paid the
vember 29, 1984.
n months after the judgment
ed States District Court for the
ced the ESM companies into re-
vered a massive securities fraud
ppearances to the contrary, the
fitable and, at the time that the

fraud was discovered, the
deficit in excess of $300 mi
Following revelation of
its claim against ESM, req
judgment ESM had obtain
state court. Peat Marwick
conduct of the 1984 trial.
that ESM's attorney helpe
Peat Marwick argued that,
had nothing to do with Pea
a fair trial because of ESM
The district court denie
state court judgment. Th
"Proof of Claim" and its
constitute fraud on the co
a basis for relief from a ju
prior to the motion for re

Peat Marwick contends
missing its claim for failur
ble relief from the state
treated Peat Marwick's c
standard. When reviewing
12(b)(6), we take all alleg
proof of claim to be well-
testing the sufficiency of
Food Machinery & Chem
S.Ct. 347, 348-49, 15 L.E
preme Court has stated th
the sufficiency of a comp
be dismissed for failure to
doubt that the plaintiff c
his claim which would en
355 U.S. 41, 45-46, 78 S.
Shopper, Inc. v. Georgia
(11th Cir. 1986) (quoting

had a cumulative

at Marwick filed
the $4.9 million
arwick in Florida
fraud in ESM's
Marwick alleged
etuate that fraud.
's securities fraud
it did not receive

ief from the 1984
Peat Marwick's
f proven, did not
could not provide
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llowed.

ourt erred in dis-
action for equita-
The district court
R.Civ.P. 12(b)(6)
s pursuant to Rule
at Marwick in its
or the purposes of
Process Equip. v.
S. 172, 174-75, 86
addition, the Su-
le" for appraising
plaint should not
it appears beyond
acts in support of
Conley v. Gibson,
0 (1957); *Tiftarea*
F.2d 1115, 1117-18

> fraud, accident, or mistake which prevented
> in the judgment from obtaining the benefit
> (4) the absence of fault or negligence on the
> dant; and (5) the absence of any adequate

Bankers Mortgage Co. v. United States, 423 F.
Cir.), *cert. denied*, 399 U.S. 927, 90 S.Ct. 2242, 2
(1970) (quoting *National Surety Co. v. State Ban*
599 (8th Cir. 1903)).

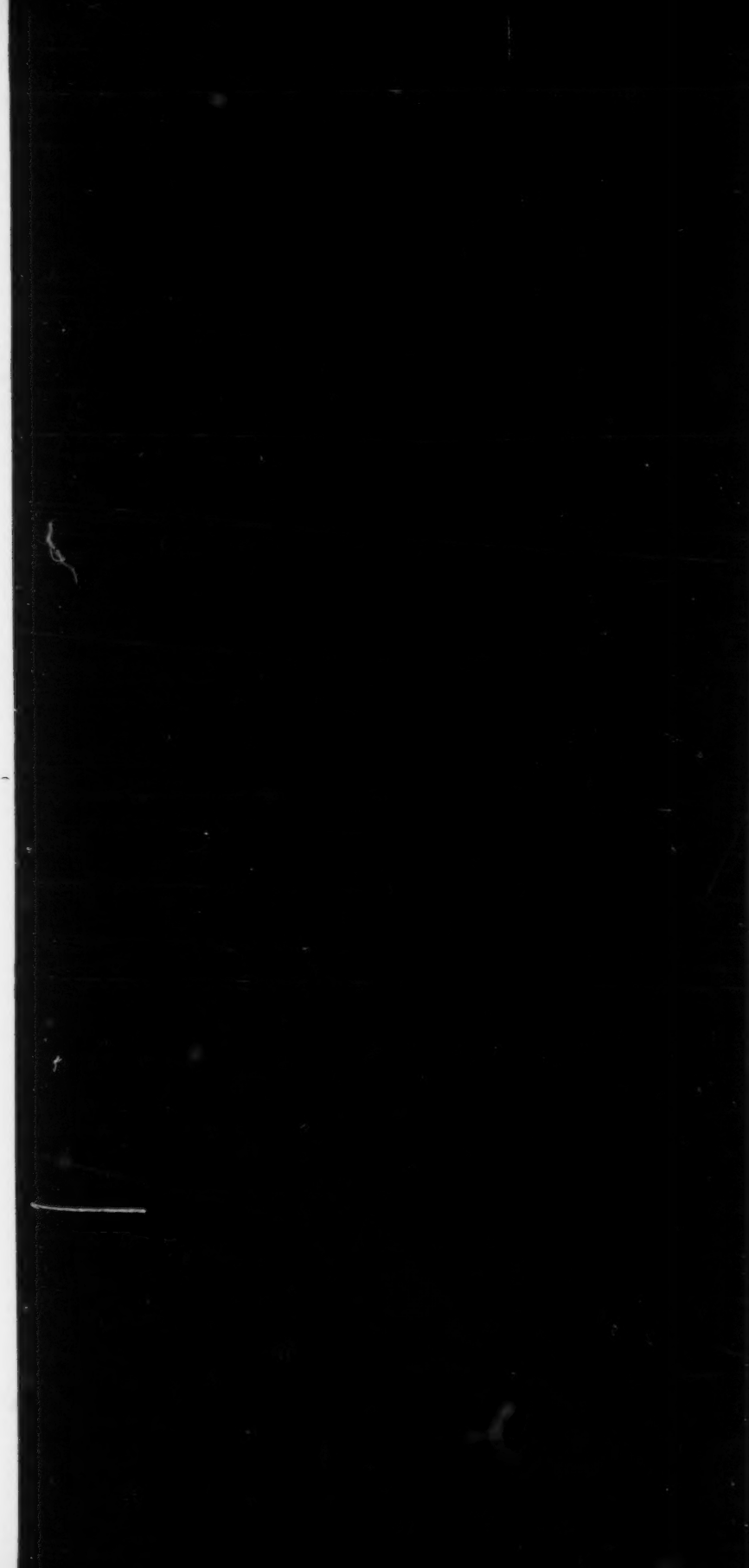
In the case at bar, Peat Marwick cannot est
ments necessary to maintain an independent acti
which it asserts tainted the outcome of the state
nothing to do with the negligent audit for which
was found liable. Peat Marwick did not have
ESM's cause of action for negligence which it
from establishing because of ESM's fraud. Rathe
rities fraud would have been introduced only to a
ibility of ESM's witnesses. Thus, the second and
of an independent action do not exist here. M
Marwick cannot establish the fourth element o
dent action, which requires the claimant to be fre
negligence, because it was negligent in the prepar
dit report. This negligence was the basis of the st
ment. Therefore, because Peat Marwick has not
that it can maintain an independent action,[2] it n
there was fraud on the court in order to obtain re
ment. *See* Fed.R.Civ.P. 60(b).

Traveler's Indemnity Co. v. Gore, 761 F.2d
1985) (per curiam) (affirmed on opinion of dist
fines "fraud on the court" as:

> embrac[ing] only that species of fraud wh
> tempts to, defile the court itself, or is a fra
> by officers of the court so that the judicial
> not perform in the usual manner its impar

---

2 Because Peat Marwick has not set forth the eleme
dent action, we do not decide whether its claim establis
"intrinsic" fraud, nor do we discuss the type of fraud a p
obtain relief from judgment.



have known of potential defenses available to Peat Marwick, but this is not fraud on the court. *Kerwit Medical Prods., Inc. v. N & H Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980). An attorney is expected to present his client's case in the light most favorable to the client and he has no duty to inform the opposing party of potential defenses. *Id.*

Under certain circumstances, attorney misconduct may constitute fraud on the court. *See Hazel-Atlas*, 322 U.S. 238, 64 S.Ct. 997. However, *Hazel-Atlas* is distinguishable from the instant case because the attorney in that case was a direct participant in a deliberate plan conceived for the purpose of defrauding the opposing party, the patent office and the Court of Appeals.

In *Hazel-Atlas*, an attorney had written an article extolling the virtues of a patented process for "glass pouring" and he had convinced a supposedly unbiased expert in the field to sign the article as the author. The attorney then relied on the article as authority in his arguments to the Third Circuit in a patent infringement action. *Id.* at 240-41, 64 S.Ct. at 998-99. The Supreme Court concluded that this conduct amounted to a "wrong against the institutions set up to protect and safeguard the public." *Id.* at 246, 64 S.Ct. at 1001.

By comparison, ESM's attorney, even if he knew of ESM's securities fraud, did not have the same impact on the judicial system. Peat Marwick does not allege that ESM's counsel aided in the securities fraud which is the underlying reason Peat Marwick seeks relief from judgment. Moreover, the securities fraud was a separate issue from Peat Marwick's "grossly negligent" audit which was the focus of the state trial. At best, Peat Marwick's allegations against ESM's attorney amount to a failure to disclose information which would have been helpful in Peat Marwick's defense. This does not constitute fraud on the court. The fraud alleged here went strictly to the credibility of witnesses, not to any miscarriage of justice.

In sum, the district court examined Peat Marwick's claim and allegations closely and, after oral argument, determined that Peat Marwick's claim against the Receiver should be dismissed for failure to state a cause of action upon which relief could be

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 85-6190-Civ-Gonzalez

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—vs.—

GROUP, INC., ESM GOVERNMENT SECURITIES, INC., SECURITIES, INC., and ESM FINANCIAL GROUP, INC.,

Defendants.

ORDER DISMISSING CLAIM OF EAT, MARWICK, MITCHELL AND COMPANY

S MATTER came before the Court on the Equity Receiv- Objection to Peat, Marwick, Mitchell and Company's t, Marwick") Proof of Claim. Peat, Marwick had filed its against ESM Group, Inc. ("Group"), one of the defen- which has been placed into receivership upon request of United States Securities and Exchange Commission. as Tew is the duly appointed, qualified and acting Equity ver for Group.

t, Marwick had filed a proof of claim pursuant to an or- f this Court fixing the last date for creditors to file their s against Group. The claim was based upon Peat, ick's payment to Group of a Florida Circuit Court judg- rendered in favor of Group and against Peat, Marwick in mount of $4,477,355.33, plus interest in the amount of 352.83, for a total payment of $4,942,708.16. The judg- was entered on January 18, 1984, after a jury found Peat,

Marwick grossly m
about the financia
("WUV's"), a now
into receivership or

The Receiver, in
claim was an impe
judgment vacated o
try of the judgmen
committed a fraud
thus giving this Co
the judgment more
suant to its Order d
Marwick to Establi
Receiver treated the
as a motion to dism
Rules of Civil Proc
by Peat, Marwick i
ceiver's Objection,
deemed by the Cou
of testing the suffi

Peat, Marwick a
their officers and di
which they defraud
was committed in
statements and opi
the ESM companie
mez, a partner at A
auditor for the ESI
involved the passin
ties, Inc. ("Govern
tion, ESM Financia
thus deceived into
sound.

Peat, Marwick fu
ation of a false "re
company account re
the parent of Gove
payable created th

ther ESM companies had likely been
30. At the time of the institution of the
35, the ESM companies had a cumula-
f $300 million.
alleged that the fraud was done with
icipation of certain shareholders and
panies during the relevant periods of
fied at the Circuit Court trial. Because
he fraud and the participation in the
es in the Circuit Court action, Peat,
it did not receive a fair trial, and that
fraud upon the court, which would en-
quitable relief from the judgment en-
rior to the filing of Peat, Marwick's
ip action. More specifically, Peat,
pes of fraudulent conduct on the part
d attorneys: (1) perjury by several of
d on behalf of Group; (2) the turnover
g discovery of documents which re-
status of Group and the other ESM
ledge and concealment of ESM's bleak
Group's attorney. For the reasons dis-
holds that the fraud alleged by Peat,
is not extrinsic fraud and not "fraud
Peat, Marwick's claim must be dis-

LUSIONS OF LAW

red to be an issue of whether Florida
1.540(b) or Federal Rule of Civil Proce-
n the issues raised by the Receiver's ob-
gued that the Florida rule should apply,
mpkins, 304 U.S. 64, 58 S.Ct. 817, 82
Marwick argued that the Federal Rule
Plumer, 380 U.S. 460, 85 S.Ct. 1136,
The Court holds that Peat, Marwick's
d regardless of which rule is applied.

Peat, Marwick's allegations do not constitute extrinsic fraud or "fraud upon the court," which is the only species of fraud that would entitle it to vacate the state court judgment more than one year after it was entered. Federal Rule 60(b) states:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The judgment shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . or to set aside a judgment for fraud upon the court. . . . [T]he procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Fed. R. Civ. P. 60(b).

The comparable Florida Rule 1.540(b) is nearly identical; however, it lacks clause (b)(6). The Florida Rule in fact was patterned after Federal Rule 60(b). *DeClaire v. Yohanan*, 453 So.2d 375, 377 (Fla. 1984).

The long-standing policy of favoring an end to litigation underlies the one-year limitation imposed by both rules. Because public policy favors an end to litigation, the grounds for setting aside a judgment more than one year after entry are extremely

mited. In very rare circumstances, involving a "fraud upon ne court," a litigant's misconduct may deprive his opponent of ccess to a fair and impartial system of justice. In these circumances, the opposing party is rendered totally unable to present s case to a fair and impartial trier of fact. When a party's fraud upon the court" has so infected the system that the opsing party literally is deprived of its access to a fair and imartial system of justice, a judgment may be set aside after the ne-year period has expired. *See, e.g.*, Rule 1.540, *Fla. R. Civ. .*; Rule 60(b), *Fed. R. Civ. P.*

As articulated by most courts, fraud upon the court relates to n impairment of the judicial process; it has no relation to raud between the parties. *Moore's*, for example, defines fraud upon the court" as follows:

> "Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct.

J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 60.33 at 60-60 (2d Ed. 1983).

Both the United States and Florida Supreme Courts have recgnized the distinction between fraud among parties and fraud nvolving the court, both of which are grounds for vacating a udgment. Fraud between parties must be brought to a court's ttention within one year after judgment is entered; fraud that revents the functioning of the judicial process may be brought o a court's attention at any time. *See, e.g., United States v. Throckmorton*, 98 U.S. 61, 25 L.Ed. 93 (1878); *DeClaire v. Yohanan*, 453 So.2d 375 (Fla. 1984). Misconduct among parties o litigation is most often defined as "intrinsic" fraud, while nisconduct that impairs the system is defined as "fraud upon he court" or "extrinsic" fraud.

The United States Supreme Court long has held that "extrinic" fraud contemplates an impairment of the judicial machin-

so pervasive as to prevent a party from having the
to present its case. In *United States v. Throckmor-*
. 61, 65-66, 25 L.Ed. 93 (1878), the court stated:

the unsuccessful party has been prevented from ex-
g fully his case, by fraud or deception practiced
im by his opponent, as by keeping him away from
a false promise of a compromise; or where the de-
t never had knowledge of the suit, being kept in ig-
e by the acts of the plaintiff; or where an attorney
lently or without authority assumes to represent a
nd connives at his defeat; or where the attorney reg-
employed corruptly sells out his client's interest to
ner side—these, and similar cases which show that
as never been a real contest in the trial or hearing of
e, are reasons for which a new suit may be sustained
aside and annul the former judgment or decree, and
he case for a new and a fair hearing.

nsic fraud includes misconduct that infects the
or lawyers, and not solely the parties to the lawsuit.
ed States Supreme Court's definition of extrinsic
een adopted by the Florida Supreme Court in *De-*
ohanan, 453 So.2d 375 (Fla. 1984). In that case a
ted to set aside a final judgment of dissolution three
its entry on the ground that the husband had filed a
ial statement, but the trial court refused to set aside
nt. The intermediate appellate court reversed the
nd vacated the judgment, holding that the filing of
inancial statement constituted a "fraud upon the
e Florida Supreme Court disagreed, holding that the
fraud was not the kind of extrinsic fraud that under
morton analysis would enable a court to set aside a
nore then one year after it was entered. Rather, the
hat the husband's act constituted intrinsic fraud that
asserted within one year under *Fla. R. Civ. P.*
53 So.2d at 380.

enth Circuit has also followed the *Throckmorton*
Travelers Indemnity Company v. Gore, 761 F.2d

, the Court granted a motion to dismiss the
r relief from a judgment pursuant to Rule
e than one year had elapsed since the entry
e Court further held that the action could
s an independent action within the savings
Id. Holding that an independent action to
ore then one year old must be grounded on
ırt," the court stated:

trinsic fraud which will not support relief
through an independent action. *See United*
kmorton. . . . Under the *Throckmorton*
ıud to lay a foundation for an independent
ɒe such that it was not in issue in the former
l it have been put in issue by the reasonable
opposing party. . . . Perjury by a party
he standard because the opposing party is
from fully presenting his case and raising
jury in the original action.

d fabricated evidence are evils that can and
exposed at trial, and the legal system en-
ınd expects litigants to root them out as
ossible. . . . Fraud on the court is there-
ed to the more egregious forms of subver-
egal processes, . . . Those we cannot
expect to be exposed to by the normal ad-
ocess.

Great Coastal Express v. Brotherhood of
1349, 1357 (4th Cir. 1982).

ıs had an adequate opportunity to express
in its proof of claim, its reply to the Re-
ıd in oral argument before the Court. None
however, would constitute extrinsic fraud
n the meaning of *Throckmorton, Travelers*
ıtially, Peat, Marwick's description of
ud upon the Court boils down to its asser-
subsidiary, Government, had issued false
, Group could not have reasonably relied

financial statement prepared for
arwick, had it known of Govern-
cial statements, it could have im-
roup's witnesses relating to its
cial statement. However, as was
in *Travelers*:

Gore obtained his judgment in
of perjured testimony to support
s action is an attempt to relitigate
ss, an issue that was necessarily
ial.

hat Group, through its witnesses,
t. As pointed out in *Traveler's*,
ud that should be rooted out early
uld not have prevented Peat,
tial system of justice. At best, it
ited States and Florida Supreme
it have expressly held to be insuf-

eral allegations concerning pur-
s attorney in the Broward Circuit
ns include that the attorney was
ndition and of the fraud allegedly
customers and creditors. Even if
owever, it is not the sort of mis-
would constitute fraud upon the
wledge by Group's attorney of a
o Peat, Marwick. This does not
rt, for a plaintiff is not obligated
ential defenses that the defendant
laims. *Kerwit Medical Products,*
Inc., 616 F.2d 833 (5th Cir. 1980);
s of the University of Georgia, 90

ny v. Hartford Empire Co., 322
.Ed. 1250 (1944), relied upon by

Peat, Marwick, is not c
distinguishable here for
by the Eleventh Circuit i

> The court finds *Ha*
> stant case in that he
> volvement in Gore'
> that the normal, in
> heard the insurance
> any manner by the

761 F.2d at 1551, 1552.
relating to Group's attor
terference with the imp
Court presiding over the

Finally, Peat, Marwi
grants a court authority
more than one year after
clause is illogical as a
stated in *Moore's*:

> Further, the maxim
> plies to clause (1) a
> after the year perio
> relief under clause
> (2), and (3).

7 *Moore's Federal Pract*
most unanimous on tha
States, 335 U.S. 601, 33
(1949); *William Skilling*
tion Ltd., 594 F.2d 107

The facts asserted in
sponse to the Receiver'
the hearing on the Rece
constitute fraud upon th
sufficient to grant relie
after its entry. As cou

persuasive. That case is
ons it was distinguished
upra:

inguishable from the in-
allegation of attorney in-
l no evidence to suggest
tion of the court which
e was interfered with in
ated by Gore.

t, Marwick's allegations
, would not show any in-
ion of the state Circuit

t Federal Rule 60(b)(6)
gment for intrinsic fraud
wever, this reading of the
tutory construction. As

ation of one year that ap-
would be meaningless, if
movant could be granted
s covered by clauses (1),

0-266. The case law is al-
e.g., *Klapprott v. United*
. 384, 93 L.Ed. 266, 1099
es v. Cunard Transporta-
9).

N

's Proof of Claim, its re-
d its arguments made at
n, even if proven, do not
is the only kind of fraud
ment more than one year
at oral argument, Peat,

APPENDIX C

IN THE UNITED STATES COURT OF A
FOR THE ELEVENTH CIRCUIT

No. 86-5958

SECURITIES & EXCHANGE COMMISS

—VS.—

ESM GROUP, INC., et al.,

Defe

PEAT, MARWICK, MITCHELL AND

Clai

Appeal from the United States Distric
for the Southern District of Flori

ON PETITION(S) FOR REHEARIN
SUGGESTION(S) OF REHEARI

(Opinion January 7, 1988, 11 Cir., 1988, _
February 10, 1988)

Before:

JOHNSON and ANDERSON, *Circuit J*
and ATKINS*, *Senior District Ju*

* Honorable C. Clyde Atkins, Senior U.S. Di
Southern District of Florida, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
Case No: 85-6190-Civ-Gonzalez

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

—vs.—

ESM GROUP, INC., ESM SECURITIES INC., and
ESM FINANCIAL GROUP, INC.,
Defendants.

AMENDED PROOF OF CLAIM

1. [If claimant is an individual claiming for himself] The undersigned, who is the claimant herein, resides at*

[If claimant is a partnership claiming through a member] The undersigned, whose offices are located at Beasley, Olle, Downs & Keihner, 2700 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida, is counsel for the claimant Peat, Marwick, Mitchell & Co., a partnership composed of certified public accountants, doing business at *One Corporate Plaza, 100 E. Broward Blvd., Ft. Lauderdale, Florida and is authorized to make this proof of claim on behalf of the partnership.

[If claimant is a corporation claiming through an authorized officer] The undersigned, who resides at* _____ _____ is the _____ of _____, a corporation organized under the laws of _____, _____

* State mailing address.

This claim is not subject to any setoff or counterclaim.

No security interest is held for this claim.

f a security interest in the property of the debtor is claimed]
undersigned claims the security under the writing referred
n paragraph 4 hereof [or under a separate writing (or dupli-
of which) is attached hereto, or under a separate writing
ch cannot be attached hereto for the reason set forth in the
ement attached hereto]. Evidence of perfection of such se-
ty interest is also attached hereto.

0. This claim is a general unsecured claim, except to the ex-
that the security interest, if any, described in paragraph 9 is
ficient to satisfy the claim.

plus interest from
$4,942,708.16 November 29, 1984
Total Amount Claimed

TED:

im Number _____
r Office Use Only)

Name of Creditor: Peat, Marwick, Mitchell & Co.
(Print or Type Full Name of Creditor)

or

Address of Creditor: One Corporate Plaza
100 East Broward Boulevard
Fort Lauderdale, Florida

: /s/ James W. Beasley, Jr.
Signature of Authorized Representative (Also Type)
Beasley, Olle, Downs & Keihner
2700 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2395 / (305) 371-5400

Its: Attorney
Title or Position (If Applicable)

CLAIM O

1. On Marc
"Group") filed
& Co. ("PMM
style of that
Marwick, Mitc
lawsuit, Group
amounting to
nancial statem
in which Grou
during the per
That case was
On January 18
verdict for $4
compensatory
and $10,000.0
Florida Fourth
84-293. The co
PMM paid the
for a total of

2. The esse
that PMM was
opinion, dated
statements of
December 31,
Inc. was in fa
ments should
PMM. One ke
financial prob
was a receivab
was allegedly
claim against
March 14, 198

od from April 29, 1980 to August 27,

985, the Securities and Exchange Com-
n for injunctive and other relief against
rnment Securities, Inc., E.S.M. Finan-
.M. Securities, Inc., and E.S.M. Avia-
ne day, the defendant corporations,
e placed in receivership by order of this
at order, attorney Thomas Tew was ap-
ie assets of E.S.M. Group, Inc. One of
s, E.S.M. Government Securities, Inc.,
nkruptcy. The other E.S.M. companies
hip.

35, the receiver for E.S.M. Group, Inc.
he Condition of the E.S.M. companies
ulent conduct of the E.S.M. companies,
volved the maintenance in business of
er their actual insolvency, by causing the
asing losses of E.S.M Government Secu-
ected on the books of a related corpora-
ncial Group, Inc., while cash for
I. Government Securities, Inc. was ob-
rs who were fraudulently led to believe
as financially sound. An intercompany
to reflect a payable from E.S.M. Finan-
E.S.M. Group, Inc. By accruals of inter-
le", Group was thus made to appear
ie discovery of this fraud in March 1985.
companies had been insolvent since at
ir inception during the years 1975-77, the
mpanies had never been profitable, and
scovery of the fraud in March 1985, the
had a cumulative deficit in excess of

aud was perpetrated with the knowledge
f Ronnie R. Ewton, who was majority
ved as chairman of the board or as presi-

dent of all the E.S.M. companies during the period of the Wuv's transaction up until March 1985 when the fraud was made public. Jose Gomez, the Alexander Grant & Co. partner who served as partner in charge of audits for the E.S.M. companies during the same period, was also a participant in the fraud. The receiver for the E.S.M. companies has filed an action in this Court against Mr. Gomez and Alexander Grant & Co., alleging that Mr. Gomez and Alexander Grant & Co. were grossly negligent in their preparation of the audited financial statements of E.S.M. Government Securities, Inc., and in issuing a "clean" opinion as to the financial condition of those companies. The Securities and Exchange Commission has also filed an action before this Court alleging that Mr. Gomez was bribed by E.S.M. to issue a "clean" opinion on the financial statements of the E.S.M. companies' financial statements, at least for the year ended December 31, 1984, and that the financial statements and audit reports at least as far back as 1980 had been prepared in violation of the anti-fraud provisions of the federal securities laws. Mr. Gomez has pleaded guilty to criminal charges of larceny and grand theft brought against him by the State of Ohio for his role in the E.S.M. fraud.

6. Because of the fraudulent manipulation of the E.S.M. companies' accounting records, and the further concealment of that fraud by Jose Gomez, the E.S.M. companies' supposed "independent" auditor, this massive fraud was successfully hidden from numerous state and federal governmental regulatory agencies, as well as from the public, for nearly a decade. The Securities and Exchange Commission had itself failed, in spite of investigation and litigation spanning the years 1977 to 1981 concerning alleged violations by the E.S.M. companies of the federal securities laws, to uncover the massive fraud then being perpetrated.

7. By successfully concealing the fraud in which it was then actively engaged, Group prevented PMM from defending the suit brought against it by Group.

8. In light of the facts disclosed since March 1985 concerning the E.S.M. fraud, Group could not possibly have relied upon the PMM audit report in making the Wuv's investments. Group, by and through its directors, officers, and accountant, had initiated its practice of concealment and fraud by transferring substantial losses to a related company, before it began transferring any funds to Wuv's International. Group was not only insolvent when the so-called investments in Wuv's were made, but its directors, officers, and accountants had specific, particular knowledge of how this fact could be and was fraudulently concealed from the public, Group's investors, and governmental agencies. The alleged financial problems of Wuv's International were trivial when compared to those being concealed in the E.S.M. companies. With this experience in fraud and concealment, neither Group nor its directors, officers, or accountant could have relied upon the portion of the PMM audit of Wuv's that reflected a receivable from its sole shareholder.

9. Had the E.S.M. fraud been known to PMM at the time of trial, PMM would have been able to impeach Group's witnesses, including Mr. Ewton (who was referred to at trial as a "man of his word"), Mr. George Mead (who testified at trial about E.S.M.'s "moral obligations") and Mr. Gomez. Group and its affiliates and executives were held out to the jury and to the court as reputable investment bankers, when in fact they were engaged in perpetrating a massive fraud. The perjured testimony of Group's witnesses was wilfully and purposely falsely given, was material to the issues tried, and controlled the result in the case.

10. The concealment by Group of the fraudulent conduct by Jose Gomez, and his lack of independence as auditor of the related E.S.M. companies, was essential to Group's obtaining a judgment against PMM. Mr. Gomez himself was deposed by PMM's counsel prior to trial, and he and his testimony were repeatedly referred to at trial.

11. The fraud perpetrated by Group against PMM and the Circuit Court included the participation of Group's attorney,

the Court. Group's attorney knew of the because he became intimately familiar with the ition of these [E.S.M.] persons and entities, in- solvency of E.S.M., and their extensive illicit d business dealings, and assisted Group in pre- blic from detecting the E.S.M. fraud. Group's ng knowledge of E.S.M.'s false financial state- fraud E.S.M. was perpetrating on the public, Group's scheme to defraud PMM and the Cir- he misconduct of Group's attorney includes, ted to, the following:

ly providing to PMM (in response to PMM's ests) false financial statements about E.S.M. d E.S.M.'s true condition. This affirmative denied PMM the ability to defend itself in the

ly vouching to the court and jury for the credi- grity of E.S.M.'s principals, when he well knew n which E.S.M. was engaged.

ly tendering perjured testimony to the court h testimony was material to the outcome of the

concealed its fraud from PMM by failing to mation during pretrial discovery that would PMM to detect E.S.M.'s fraud. The fraud per- the E.S.M. companies' accounting and finan- as well as the testimony of the companies' d made all of Group's compliance with discov- kewise fraudulent. Group's case against PMM tely planned and carefully executed scheme to l and the Circuit Court, in which Group's attor- participated.

ud perpetrated by Group constituted fraud on extrinsic fraud, entitling PMM to relief from rendered against it. PMM is also entitled to re- ound of newly discovered evidence, which evi-

14. Be
facts of
could no
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Wuv's li

15. PI
that the
fraudule
invalid.
entitled
amount
1984.

oup's fraudulent concealment of the ompanies' financial condition, PMM se of reasonable diligence have discov- p and its affiliates in the course of the

d to, and demands, a determination ered against it in favor of Group was and should be set aside or considered as already satisfied the judgment, it is this proceeding against Group in the .16, plus interest from November 29,